

STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, ST. LOUIS

EDWARD F. PLASTINO, et al,)
)
Plaintiff,)
)
v.) No. 4:12CV1316-CAS
)
CHRIS KOSTER, et al,)
)
Defendant.)

PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

APRIL 23, 2013

APPEARANCES:

For Plaintiff: David G. Sigale
LAW FIRM OF DAVID G. SIGALE, P.C.
739 Roosevelt Rd., Ste. 304
Glen Ellyn, IL 60137

Matthew T. Singer
LAW OFFICE OF MATTHEW T. SINGER
6963 Waterman
St. Louis, MO 63130

For Defendant: Joanna L. Trachtenberg
ATTORNEY GENERAL OF MISSOURI OFFICE
P.O. Box 899
Jefferson City, MO 65102

Robert E. Hoeynck, Jr.
Toby J. Dible
ST. CHARLES COUNTY COUNSELOR'S OFFICE
100 N. Third Street, Ste. 216
St. Charles, MO 63301

1 REPORTED BY: PATTI DUNN WECKE, RMR, CRR, CMRS
2 Official Court Reporter
3 United States District Court
4 111 S. Tenth Street
5 St. Louis, MO 63102
6 314-244-7984

7
8
9
10 PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 (THE FOLLOWING PROCEEDINGS WERE HAD ON APRIL 23,
2 2013, IN OPEN COURT:)

3 THE COURT: This is Edward Plastino versus Chris
4 Koster and Tom Neer and we're here on preliminary
5 injunction. Who do we have representing Mr. Plastino?

6 MR. SIGALE: Good afternoon, Your Honor. David
7 Sigale, S-I-G-A-L-E, on behalf of Mr. Plastino.

8 MR. SINGER: Your Honor, Matthew Singer, local
9 counsel.

10 THE COURT: Okay.

11 MR. SIGALE: And, Your Honor, Mr. Plastino is
12 actually present today as well.

13 THE COURT: Hello, Mr. Plastino, how are you
14 doing? Very well. And who do we have representing the
15 Attorney General?

16 MS. TRACHTENBERG: Joann Trachtenberg, Your
17 Honor.

18 THE COURT: And representing Mr. Neer?

19 MR. HOEYNCK: Robert Hoeynck of St. Charles
20 County Counselor's Office.

21 MS. DIBLE: And Toby Dible, also of St. Charles
22 County Counselor's Office.

23 THE COURT: Okay. First of all, I'm just
24 wondering why there was this belated filing of this
25 preliminary injunction in this case. I was inclined to

1 take this with the case. Any answer to that?

2 MR. SIGALE: I'm sorry, Your Honor?

3 THE COURT: Mr. Sigale, I'm saying you kind of
4 delayed on this. You didn't file this case asking for a
5 TRO, so now you're filing for a preliminary injunction.
6 What's the deal? What was the delay? Oh, yeah, I need
7 this right away.

8 MR. SIGALE: Your Honor, I apologize, I didn't
9 realize there was a delay. I filed for -- I mean, I
10 started writing the preliminary injunction motion and
11 memorandum pretty much right after I received --

12 THE COURT: No, no, I'm saying when you filed the
13 case, generally if you are in a hurry, you ask for a TRO as
14 soon as you file it.

15 MR. SIGALE: Your Honor, in discussions with my
16 clients, we just felt that right now laying out the facts
17 in a preliminary injunction motion was the better choice,
18 Your Honor.

19 THE COURT: Well, is there any reason why they
20 shouldn't be taken with the case as a whole?

21 MR. SIGALE: Yes, Your Honor. I mean, for the
22 reasons that we are arguing for a preliminary injunction,
23 and mostly --

24 THE COURT: Okay, well tell me -- give me your
25 strongest reason for not delaying this. Why you need this

1 right away?

2 MR. SIGALE: The irreparable harm to Mr. --

3 THE COURT: What's the irreparable harm?

4 MR. SIGALE: The irreparable harm is twofold,
5 Your Honor. The irreparable harm is, one, the deprivation
6 of constitutional rights involved which --

7 THE COURT: Constitutional rights? He's not
8 denied the right to own or carry a weapon displayed. The
9 state statute just talks about conceal, so I don't know
10 about any second amendment. There are some limitations on
11 that.

12 MR. SIGALE: Well, Your Honor, and if I may, I
13 was going to ask to submit this to the Court.

14 THE COURT: Well, it's kind of late. You can
15 give it to us when it's over. I can't read it now.

16 MR. SIGALE: I'm not asking the Court to read it
17 now. I'll just proffer to the Court that it is an entry of
18 a preliminary injunction from March 30th by the district
19 court in New Mexico on this exact same issue. Your Honor,
20 the Court found that the violation of equal protection
21 rights is in and of itself a fundamental right, and
22 therefore there is a constitutional right even if the Court
23 --

24 THE COURT: Well, I'll take a look at that. You
25 know, you say it stands for one thing, and I haven't looked

1 at it, so fine and well, but they may have issued a TRO,
2 but I really don't see -- I have difficulty seeing this
3 irreparable harm, you know, at this point in terms of
4 granting a TRO. On the other hand, this security
5 interests, I mean, maybe the State can tell us something
6 about the security interests they are talking about, maybe
7 Mr. Hoeynck can tell us about it. I mean, if somebody can
8 carry a gun that's open and so forth, what's the
9 difference, you know, in terms of being a citizen and legal
10 resident? I don't see all this security there. Tell me
11 about that. Here you've got these cases where, okay, you
12 know, it's all right to take the bar, can't discriminate on
13 that basis, fishing license, or I guess a hunting license
14 or whatever. Talk to me.

15 MS. TRACHTENBERG: Ms. Trachtenberg, Your Honor.
16 I've replaced Andrew Hartnett on this case. Your Honor,
17 the State has made a decision to regulate concealed carry
18 with a permit. And to obtain a concealed carry permit, you
19 have to pass certain requirements, one of which is a
20 background check. And the background check examines
21 whether somebody has a felony background, whether they
22 have --

23 THE COURT: How is it more difficult to do a
24 background check on a citizen as compared to a legal
25 resident?

1 MS. TRACHTENBERG: Well, the difference is that
2 the background check database that we have access to only
3 really has domestic felony records in it. It has
4 international warrants but it doesn't have international
5 felony records.

6 THE COURT: Well, what about a citizen traveling
7 overseas and committing a felony?

8 MS. TRACHTENBERG: Your Honor, it's true that
9 it's possible that a citizen could travel overseas and
10 commit a felony, but the ties to another country when
11 somebody is a citizen of another country are certainly
12 stronger than the ties that you would expect from a citizen
13 of the United States to another country. And so the State
14 has made a decision that it's much more difficult to track
15 down criminal backgrounds from other countries, and so they
16 limit this license, which is not a Second Amendment right,
17 it's a concealed-carry permit, which many courts have found
18 is not a Second Amendment right, and they limit this
19 license to U.S. citizens in part because the background
20 checks are substantially easier for domestic crimes than
21 for international crimes.

22 THE COURT: Well. Any response to that, Mr.
23 Sigale?

24 MR. SIGALE: Twofold, Your Honor. The first is
25 that any speculative, A, acts that a legal resident alien

1 like Mr. Plastino who there is nothing offered by the State
2 and certainly nothing that they would find regardless, that
3 Mr. Plastino or any legal resident alien is somehow more
4 untrustworthy or more likely to commit any bad act --

5 THE COURT: Is there any time requirement
6 relative in terms of a legal resident as compared to a
7 citizen, for instance, if a legal resident -- is there a
8 length of time? There is no length of time in the State
9 statute, is there?

10 MS. TRACHTENBERG: No, Your Honor, there's not.

11 MR. SIGALE: You are either a citizen or you're
12 not. So, number one, the act, the speculative argument
13 that maybe a lawful resident alien has a felony record
14 somewhere else, and a citizen has a felony crime somewhere
15 else, I mean, it's all speculative. It basically is
16 another way of making the argument that lawful resident
17 aliens are somehow more untrustworthy because they are
18 lawful resident aliens, which the Supreme Court has
19 specifically disallowed.

20 THE COURT: Well, I mean, there are limitations
21 like on jury service, voting, holding political office,
22 that kind of thing. There are some limitations. Now, I
23 mean, maybe the State is saying there ought to be an
24 exception relative to public safety for the protection of
25 the citizens, or whatever, you know, the public -- not

1 citizens, the public.

2 MR. SIGALE: Well, Your Honor, I will say to
3 that, number one, of course, public safety is a public
4 interest. Having said that, number two, under the case
5 law, the Second Amendment or the regulating manner of
6 carrying a firearm is not a political function such that
7 the State is allowed to discriminate, such as in perhaps
8 the Sugarmann v. Dougall case, which they weren't even
9 allowed to do that in that case. And that argument didn't
10 hold water when it came to certain types of employment, and
11 that exception to the extent that the State is allowed to
12 rely on it, it has no applicability to this case we would
13 argue, Your Honor.

14 Basically the State is arguing, A, that somehow
15 legal residents are more untrustworthy, when as the Court
16 noted, he's allowed, Mr. Plastino and others like him, they
17 are allowed to carry openly, they are allowed to carry in
18 their car, they're allowed to carry on their land, just
19 somehow for this they are not trustworthy. Well, the
20 Supreme Court has said that discrimination like that for no
21 real basis other than the basis of their class, is
22 disallowed.

23 THE COURT: Well, in a lot of instances, I mean,
24 here we got a public safety issue. You're talking about
25 this case in New Mexico, which I have not seen, and I'll

1 take a look at it, but, you know, we're moving into a
2 different area. And they are not saying that they are more
3 or less trustworthy. They are saying that they have the
4 difficulty in doing this investigation as to their
5 background. But I am bothered in terms of this preliminary
6 injunction in terms of this irreparable harm in terms of
7 obtaining a preliminary injunction, so that he can, you
8 know, so that Mr. Plastino can walk out of here and carry a
9 concealed weapon. I mean, I don't see -- what's the rush
10 on this? Where is he -- I mean, I understand, you know,
11 it's not a question as far as citizens are concerned, but,
12 I mean, what's the rush? Why does he immediately need to
13 carry a concealed weapon?

14 MR. SIGALE: Twofold, Your Honor. First, again,
15 he's being denied his constitutional rights; that in and of
16 itself is irreparable harm.

17 THE COURT: I understand that, and that's
18 something I was talking about we can deal with in terms of
19 the whole case. But you said he needs to carry a concealed
20 weapon right now.

21 MR. SIGALE: What we're saying, Your Honor, is
22 that he should be allowed to obtain a permit right now.
23 And the fact is is that he has a public safety concern as
24 well. That there are places --

25 THE COURT: Is he a law enforcement officer?

1 MR. SIGALE: No, he's a lawful resident of the
2 state.

3 THE COURT: I understand that, but you said he
4 has a public safety concern. I mean, does he have some
5 special duty to protect the public?

6 MR. SIGALE: No, he's just a member of the
7 public, Your Honor.

8 THE COURT: That's what I'm talking about. So,
9 why does he need a gun right now?

10 MR. SIGALE: He desires the permit now, Your
11 Honor.

12 THE COURT: Well, you know, I mean, the permit is
13 the gun.

14 MR. SIGALE: Well, The permit gives him the right
15 to obtain one, and certainly Mr. Plastino would desire one
16 in areas where he travels.

17 THE COURT: Well, maybe he needs to check out
18 where he's going, if he's in an area where he's -- where is
19 he traveling?

20 MR. SIGALE: Well, Your Honor --

21 THE COURT: You know, they say he's hanging out
22 in the wrong places and with the wrong people.

23 MR. SIGALE: Well, Your Honor, my office is near
24 Chicago, and certainly that argument -- that's certainly
25 true.

1 THE COURT: Do you have your permit?

2 MR. SIGALE: Your Honor, that's a separate case.
3 That's the Moore versus Madigan case.

4 THE COURT: Oh, right, okay. No, I'm talking
5 about your case. You want to bring up Chicago as an
6 example of being dangerous. I say, you got your permit?

7 MR. SIGALE: You are not allowed to get a permit
8 in Chicago.

9 THE COURT: Okay. I'm just checking.

10 MR. SIGALE: We're fighting that case right now
11 actually. But, Your Honor, basically the State has no --
12 the State has no constitutional basis for discriminating.

13 THE COURT: Well, you know, I can somewhat see
14 this equal protection argument, but I do not see the Second
15 Amendment argument because I see that there could be some
16 restrictions relative to -- I mean, there always have been,
17 whether you got a state law, that's what you're arguing
18 about in terms of equal protection -- but a Second
19 Amendment argument, I just don't see that at all, I just
20 don't see that.

21 MR. SIGALE: Yeah, Your Honor, and obviously the
22 plaintiffs will concede that the Supreme Court has not yet
23 ruled that a concealed carry is a fundamental right, but
24 what is a fundamental right as implied if not stated by the
25 Court in District of Columbia versus Heller, and in

1 McDonald versus City of Chicago, and --

2 THE COURT: Well, those was guns in the homes,
3 weren't they?

4 MR. SIGALE: Well, that was the fact pattern, but
5 that wasn't what the Court was -- the Court wasn't limiting
6 its ruling to the home. What the Court said in those cases
7 is that the people have the fundamental right to keep and
8 bear arms for confrontation, which is not limited to the
9 home.

10 At any rate, Your Honor, the plaintiffs will
11 concede that doesn't specifically say concealed carry, but
12 what it does say is public carrying. Now, the State, of
13 course, has the right to regulate public carrying. One of
14 the ways the State has the right to regulate public carry
15 is to choose the manner of public carry. They can choose
16 open carry. They can choose concealed carry. State of
17 Missouri allows both. That's the manner in which they've
18 chosen to regulate the public carrying of firearms, which
19 is a fundamental Second Amendment right. The only
20 difference is, is that they are discriminating against
21 Mr. Plastino and others like him for no other reason than
22 their class. And to the extent that the Court feels that
23 that's kind of a hybrid Second Amendment and Fourteenth
24 Amendment argument, then, you know, the Court could look at
25 it that way. But that argument, that reality does exist,

1 and that's even aside from the argument of, that any
2 discrimination by those as a class, even if it's not about
3 a fundamental right, whether the Court is talking about
4 social rights and economic rights, that is a violation of
5 Fourteenth Amendment, equal protection, and is subject to
6 strict scrutiny as well.

7 So, that the Second Amendment argument, yeah,
8 it's kind of intertwined with the Fourteenth Amendment.
9 The State doesn't get to choose the manner of concealed --
10 of public carrying and then deny it to an entire class just
11 because they are a class.

12 So, if the Court sees the Second Amendment right
13 that I'm discussing is fundamental, then that's one avenue.
14 But equally valid is the other avenue, which is here is a
15 law that lawful aliens are being discriminated against on
16 the basis of class. And even if the Court -- and again the
17 New Mexico case I submitted to the Court, and I would ask
18 you to please take a look at it.

19 THE COURT: I'll take a look at it.

20 MR. SIGALE: But that Court, just for disclosure,
21 said that it does not find a Second Amendment right to
22 concealed carry, but nevertheless equal protection applies,
23 and entered the preliminary injunction.

24 THE COURT: Is it the same fact, is it the same
25 situation here, same state laws, both the concealed carry

1 open carry, but only the concealed carry, it disallows
2 anyone but citizens to get a concealed-carry permit? Is it
3 the same factfinder?

4 MR. SIGALE: It is.

5 THE COURT: Well, I'll take a look.

6 MR. SIGALE: And Tenth Circuit law is a little
7 bit different with regard to the Second Amendment.

8 THE COURT: Well, Arizona, they used to call it
9 the wild, wild west, you know, so.

10 MR. SIGALE: But if the Court chooses to rule the
11 same way as Judge Armijo in the District of New Mexico,
12 plaintiffs will be perfectly satisfied.

13 THE COURT: I guess so. Anything else you want
14 to tell me?

15 MR. SIGALE: Other than --

16 THE COURT: Mr. Singer seems to be chomping at
17 the bit. You got anything? You want a quick hit here?

18 MR. SINGER: Your Honor, you asked a number of
19 pertinent questions as a practical matter --

20 THE COURT: I always ask perfect questions.

21 MR. SINGER: Absolutely.

22 THE COURT: I am looking for perfect answers,
23 that's my problem.

24 MR. SINGER: And I hope to give you a couple of
25 those.

1 THE COURT: Go for it.

2 MR. SINGER: I'm local counsel. I do have my
3 CCW. When I got my CCW it was at the suggestion of the
4 St. Louis Police Department after I called them. They said
5 they were not able to respond to all calls, I should learn
6 to secure myself. So, what does that mean? They said get
7 a gun, learn how to use it. I said I don't feel
8 comfortable taking my five-year-old daughter out to this
9 car that just got broken into under an overpass, and they
10 said that's a dangerous area, just like you said. I said,
11 I'm less than two blocks from FBI headquarters, I'm right
12 at Union Station. And they said, look we can't be
13 everywhere. You need to protect yourself. We'd love to
14 protect you if we could, but we can't protect everybody.

15 THE COURT: You got the concealed carry but we're
16 talking about Mr. Plastino. You are going too far on your
17 case.

18 MR. SINGER: How are he and I different? Has he
19 committed a crime to prevent him from doing that or is he
20 merely being not a legal citizen --

21 THE COURT: You hear what the State is saying?
22 The State is saying, you know, that it's hard -- it's a
23 public safety issue. It's harder for them to do these
24 background checks, that's what they say.

25 MR. SINGER: And if Mr. Plastino had lived in the

1 state of Missouri his entire life and still had the same
2 background --

3 THE COURT: Well, I think that that's perhaps a
4 flaw in the law. Perhaps the law should have a number of
5 years with it in terms of a legal resident or something.
6 It's hard to do the background check, but maybe if somebody
7 has been here a number of years, it's a whole different
8 story. So, I think that cuts in your favor in the sense
9 that there's no time limit on this thing. It's hard to
10 check the background -- well, I understand if somebody just
11 got here recently.

12 MR. SINGER: Your Honor, if their interest was
13 only public safety it would be in preventing my client from
14 having a firearm, not from concealing and carrying one,
15 when he can openly carry one. If they want to do that,
16 then they can do that. That would be part of the 44473
17 when he goes and buys a gun, says you don't meet this
18 criteria, you're not legally allowed to own a gun. He is
19 legally allowed to own a gun in this country. He can own a
20 gun shop in this country. He can sell Class III firearms,
21 which need to be registered with the Federal Government,
22 law enforcement officers, but he can't carry a concealed
23 weapon on him?

24 MR. SIGALE: Your Honor, I do want to point out
25 something in response to what the Court just said. I just

1 want to make it perfectly clear, Your Honor, that this case
2 is limited to lawful resident aliens like Mr. Plastino and
3 others like him. This is not an illegal alien case. This
4 is not a student visa case.

5 THE COURT: I understand that.

6 MR. SIGALE: So this isn't about showing up, you
7 know, coming off at Ellis Island, you know, driving to
8 Missouri and getting a concealed carry permit. This is
9 about those people who in the words of the Supreme Court
10 have established significant connections with this country
11 such that they have earned the trust. So, this case, what
12 the Court is saying about, you know, a certain amount of
13 time to obtain a lawful resident alien card, green card,
14 you do have to reach certain criteria --

15 THE COURT: I understand. What kind of oath is
16 taken to the country as compared to a citizen?

17 MR. SIGALE: I'm sorry, Your Honor?

18 THE COURT: What kind of oath is taken as
19 compared to a citizen to the security of this country?

20 MR. SIGALE: Well, Your Honor, you do have to
21 apply for a green card. There's numerous procedural steps
22 to be taken. I'm not aware of per se an oath to be taken
23 to get a green card, but you do have to pass certain
24 procedural steps. And the Supreme Court has said that when
25 you obtain that status, you have constitutional rights, you

1 have fundamental constitutional rights, United States
2 versus Verdugo-Urquidez is the case, I believe, that you
3 have established those significant connections to this
4 country. So, again, this is not about illegal aliens or
5 student visas, but this about a specific class of persons
6 who the Supreme Court has held have those constitutional
7 rights.

8 THE COURT: I understand. Ms. Trachtenberg, you
9 going to do all the speaking?

10 MS. TRACHTENBERG: Your Honor, I think maybe
11 Mr. Hoeynck has something --

12 THE COURT: Well, plaintiffs have spoken. Mr.
13 Sigale has spoken. So do you all have anything further
14 that you all wish to say, because I'm looking at this
15 security issue and I just raised this issue about an oath,
16 and those kinds of things, and this whole thing about, you
17 know, maybe the statute would be a better statute if had
18 some time that a legal resident were a legal resident, you
19 know, of the country or something.

20 MR. HOEYNCK: Just briefly, Your Honor. We have
21 the ability to check immigration status. And conferring
22 with the records division which issues the certificates,
23 this is not a situation that comes up much. Last year --
24 we're the third largest county by population in the
25 state -- we only denied two concealed carry certificates to

1 legal resident aliens, one of which was Mr. Plastino.

2 Also, the standing issue here, we are contending
3 Second Amendment foundation itself has no standing because
4 they are not an applicant for concealed-carry permit.

5 THE COURT: I agree you may be on the money
6 there, but, you know, this whole thing of equal protection
7 seems to be a significant issue there. Ms. Trachtenberg,
8 go ahead.

9 MS. TRACHTENBERG: Just going to the issue of
10 irreparable harm --

11 THE COURT: That is where I am most concerned in
12 terms of why did Mr. Plastino need a gun right now.

13 MS. TRACHTENBERG: And I agree with you, Your
14 Honor, in fact what they've just said --

15 THE COURT: A concealed carry.

16 MS. TRACHTENBERG: -- why it's not necessary that
17 he have a preliminary injunction in this case, because he
18 has the right to open carry, he has the right to possess
19 firearms in his home. Those are the Second Amendment
20 rights here. So taking this with the case makes perfect
21 sense to me. I don't see that it needs to be done in a
22 preliminary injunction context. And taking it with the
23 case allows us to more efficiently change our practices if
24 the law is going to be changed, rather than changing and
25 then changing it back makes more sense --

1 THE COURT: And maybe too it may allow you to
2 file some more briefs and argument that is a little bit
3 more comprehensive here.

4 Well, let me tell you what. I'm going to deal
5 with this preliminary injunction, but I am not inclined to
6 grant it because I don't see the irreparable harm of
7 Mr. Plastino needs to carry a gun right now -- I mean a
8 concealed carry, because he has the other rights that
9 Ms. Trachtenberg said, he can have a gun in his house, the
10 open carry is available, but the ability to carry a
11 concealed carry, I think I'm likely to take this with the
12 whole case.

13 So, thank you gentleman. Thank you
14 Ms. Trachtenberg. You all have a pleasant day. You will
15 hear from me soon.

16 MR. SIGALE: Your Honor, I do apologize, I was
17 hoping that I might be able to briefly respond to what
18 counsel said.

19 THE COURT: I don't know that that's going to be
20 necessary. You've both had your opportunity. You file
21 your briefs in this manner. I think I've heard enough.

22 MR. SIGALE: May I approach and submit the New
23 Mexico opinion I was referring to.

24 THE COURT: Does the State have a copy of it?

25 MR. SIGALE: I submitted copies to both of

1 them.

2 THE COURT: Very well, give it to my law clerk
3 here. Thank you all.

4 (ADJOURNED)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

I, Patti Dunn Wecke, Registered Merit Reporter, hereby certify that I am a duly appointed official court reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled cause, and a true and correct transcription of my stenographic notes.

I further certify that this transcript, containing pages 1 - 22 inclusive, was delivered electronically and that this reporter takes no responsibility for missing or altered pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 4th day of 4th, 2013.

/s/Patti Dunn Wecke, RMR, CRR, CMRS
Official Reporter